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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Joanne MARSZALKOWSKI and Loran Bennett, Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Jack BROCK, Defendant-Appellee.

Nos. 80-5597, 80-5621

United States Court of Appeals,
Eleventh Circuit.

March 1, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY and FAY, Circuit Judges, and EDENFIELD*, District Judge

FAY, Circuit Judge:

This opinion resolves two separate appeals involving a single group of defendants. In November of 1979, an undercover operation undertaken by the Drug Enforcement Administration

[DEA] led to the arrests of five individuals, Loran Bennett, Stanford Mitchell, Jack Brock, Joanne Marszalkowski and Jorge Congote, on drug related charges. Brock, who obtained a severance from his four co-defendants, convinced the trial judge that his arrest was illegal. The government presently appeals this ruling, along with the trial judge's concomitant suppression of evidence found in the initial search following the arrest. Our examination of the law prevailing in this circuit at the time of the incident in question leads us to reject the trial judge's assessment. We therefore find for the appellant, the United States of America, holding that evidence obtained during the initial search should not have been excluded.

In their separate appeal, convicted co-defendants Bennett and Marszalkowski present a laundry list of grounds for reversal. Neither, alas, has succeeded in cleansing on appeal what was found to be simply dirty linen at trial. We therefore affirm their convictions. Through the analysis that follows, we hope to iron out the legal creases in their argument. Here, first, are the steamy facts:

I.

On November 6, 1979, Alfred Moscowitz, a government informant, disclosed to DEA agents that Loran Bennett was known to him as a trafficker in "large quantities of cocaine." R. Vol. VIII at 128. At the agents' request, Moscowitz phoned Bennett and told him that he was in contact with prospective purchasers of cocaine. The

following day, Moscowitz escorted DEA Agents Brown and Thompson to Bennett's place of business in Hialeah. Posing as traffickers in narcotics, the agents told Bennett they wished to buy "large quantities of cocaine." Bennett disclosed that he had an unlimited supply, available at a price of $54,000.00 per kilo.[1] He assured the agents that he could supply them with four to five kilos monthly. He agreed to deliver one kilo the following day, and three additional kilos shortly thereafter. Bennett stated that "he and his people" had previously dealt in rock cocaine but had begun dealing in flaked cocaine, a purer form of the drug, which he found to be a "better commodity."

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[1] A kilo is equivalent to approximately 2.2 pounds. R. Vol. VIII at 52.

The cocaine, he informed them, would be packaged in the shape of a football.

On November 8, the parties exchanged four telephone calls, during which Bennett disclosed that he had been successful in making contact with "his people." A major portion of the last telphone conversation, which occurred at 8:30 p.m. that day, was tape recorded; in it, Bennett assured the agents that all was ready as planned. Final arrangements were made to meet Bennett at the Ramada Inn, located at Milam Dairy Road and 72nd Avenue in Miami, for the delivery.

At 9:30 p.m., Bennett was observed driving his station wagon into the Ramada Inn parking lot accompanied by an individual later identified as Stanford Mitchell. Bennett parked the car, exited it and approached Agents

Brown and Thompson, who were standing near the front entrance of the motel. After escorting Bennett to their car, the agents showed him $58,000.00 in cash. The three men returned to Bennett's vehicle; Mitchell remained in the front seat. Bennett reached into the station wagon and retrieved a brown paper bag from a box on the car's back seat. Inside the paper bag was a football-shaped package, wrapped in masking tape. It contained a white powder determined subsequently to contain 984 grams of 48% pure cocaine. As the four men walked back to the agent's car, Brown and Thompson identified themselves. They immediately arrested Bennett and Mitchell. Bennett was found to have an automatic pistol with a holster and slip, together with rounds of ammunition in the waistband of

his trousers; Mitchell was carrying a revolver. In addition, Bennett had $1500.00 in his pocket which he stated his supplier had given him to use to find girls and to bring them back to the supplier's apartment for a party that night.

Bennett and Mitchell were then taken to the DEA office in Miami, where Bennett agreed to call his source of supply, whom he identified as Jack Brock. During their conversation, Bennett assured Brock that all had gone well "on the first one" and that the customers were ready for "three more tomorrow." Brock said that he would try to obtain the additional three kilos of cocaine. He asked Bennett to keep the buyers in town and to come over to Brock's apartment for the party. After the phone call, Bennett led the agents

to the area of an apartment in Hileah where Brock had delivered cocaine to him. He pointed out the apartment, from the outside, provided a physical description of Brock, and disclosed that a woman had been present in the apartment at the time Bennett received the drugs there. DEA agents were dispatched to maintain surveillance of the apartment. They observed two men entering and leaving the apartment carrying bags. After agents knocked at the apartment's front entrance, Brock responded, unexpectedly, by opening the kitchen door. As Brock stuck his head and torso out of the apartment, Agent Walde, who had been leaning against the kitchen entrance, fell in. The other agents followed him inside and revealed their identities. Having concluded that he fit Bennett's description of his

supplier, they asked Brock to identify himself. He complied and was arrested at once. From the kitchen, the agents were able to observe resting on a coffee table in the living room area the residue of a white powder; a mirror on which was a formula for cocaine; various cutting instruments; and cash. Joanne Marszalkowski, who was found standing in the kitchen or hallway area, was immediately arrested. A protective sweep was then conducted to look for other persons, as a result of which a handgun; scale; vial of cocaine; and a plastic bag containing white powder were found in plain view. Two agents remained inside to secure the apartment, while the others left to procure a search warrant. A search warrant was obtained and executed fifteen hours later; the latter search yielded

additional cocaine, methaqualone tablets and $10,500.00 in cash from a tall dresser in the bedroom containing women's clothing; a substance used to cut cocaine; and a .38 Smith & Wesson revolver along with additional cocaine from a nighttable next to the bed.

In June of 1980, a grand jury returned a six-count indictment charging Bennett, Mitchell, Brock, Marszalkowski and Congote with conspiracy to distribute cocaine (Count I); Bennett and Mitchell with possession of cocaine (Count II); Brock and Marszalkowski with distribution of cocaine (Count III) as well as with possession with intent to distribute cocaine and methaqualone tables (Count IV); and Bennett and Brock with use of a communication facility to further a felony (Counts V and VI). Congote was severed and convicted; his

conviction was affirmed in United States v. Congote, 656 F.2d 971 (5th Cir. 1981). Bennett's motion for severance was denied; he presently appeals the denial. During trial, the judge granted Brock's motion for severance as well as Marszalkowski's and Brock's motion to suppress evidence obtained following the initial entry of the apartment; however, he denied suppression of those items found during the subsequent search conducted pursuant to warrant. Mistrials were declared as to all counts against Mitchell and the conspiracy charge against Marszalkowski, after the jury was unable to reach verdicts regarding them.

II. Bennett's Challenge

A. Severance

Bennett complains that he was

misjoined with his co-indictees on dual grounds: first, the charge of conspiracy in Count One was multiplicitous and second, once the conspiracy charges against Mitchell and Marszalkowski were dismissed, his severance was mandatory.

[1] Federal Rule of Criminal Procedure 8(b) permits joinder of defendants in a single indictment where they are alleged to have participated in the same transaction or series of

transactions.[2] For purposes of appellate review, the facts recited in an indictment are deemed true unless joinder is based on prosecutorial bad faith or improper legal interpretation. See United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977); United States v. Nims, 524 F.2d 123, 126 (5th Cir.), cert. denied, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed. 2d 385 (1976).

While making no allegation of bad faith, Bennett does contend that the

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[2]The complete text of Fed.R.Cr.P. 8(b) is as follows:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

indictment improperly charged multiple conspiracies. Bennett likens his indictment to that in United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976), where the lone facts that the co-defendants Whitehead and Meredith lived in the same building and sold cocaine to the same buyer were insufficient grounds to support their joint indictment for distribution of the controlled substance. Although the two drug deals in Whitehead possessed the "common denominator" of defendant Jackson, who bought drugs from Whitehead in one deal and from Jackson in another, id. at 1025, no conspiracy was charged nor was any relationship whatsoever between Jackson and Meredith ever alleged. 539 F.2d at 1024, n.1. Under those circumstances, their separate, unrelated sales of cocaine could not

possibly have formed part of the same transaction or series of transactions. Joinder, therefore, was impermissible, "[s]ince the alleged criminal acts of Whitehead and Meredith were independent crimes, engaged in separately, without concert of purpose." 539 F.2d at 1023.

[2,3] By contrast, evidence of Bennett's participation in a conspiracy reflects a common scheme supporting joinder. Bennett nevertheless protests that when he purchased cocaine from Brock at the apartment rented by Marzalkowski, the latter remained in the kitchen and that therefore, if anything, multiple unrelated conspiracies existed. A single conspiracy, however, may exist even if not all conspirators take part in all aspects of the scheme. See United States v. Ochoa, 609 F.2d 198, 202 (5th Cir. 1980); United States

v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980)(en banc), cert. denied, ____ U.S. ____, 101 S.Ct. 2017, 68 L.Ed. 2d 324 (1981). Certainly the introduction of evidence including Marszalkowski's presence in the apartment at the time Bennett purchased cocaine there from Brock; the rental of the apartment in her name; and the presence of drugs in what clearly was her dresser, by virtue of its containing women's clothing, provide the requisite connection between herself and Bennett. Accordingly, we find no merit in the appellant's claim of misjoinder on the ground of multiple conspiracies.

[4,5] Moreover, the mere fact that a mistrial on the conspiracy charge was declared as to Marszalkowski does not detract from the legal adequacy of the conspiracy count. The general rule

is that even acquittal of conspiracy does not of itself establish misjoinder. Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 2d 921 (1960); Cacy v. United States, 298 F.2d 227, 228-29 (9th Cir. 1961). Bennett's second claim, then, of retroactive misjoinder, which asserts that the dismissal of the conspiracy charge against Marszalkowski requires a finding of misjoinder, is similarly misplaced.

Bennett further contests the trial judge's denial of his motion for severance of his trial from co-defendant Marszalkowski on the grounds that the admission of certain evidence, consisting of narcotics, against Marszalkowski was prejudicial as to him.

[6-9] Our analysis of this claim must begin with the accepted

principle that defendants jointly indicted should be so tried. United States v. Sullivan, 578 F.2d 121, 123 (5th Cir. 1978). An exception to this rule may be enforced where such joinder would cause the defendant undue prejudice. F.R.Cr.P. 14.[3] In determining a motion for severance brought on such grounds, the trial judge is empowered to exercise sound discretion in balancing possible prejudice to the defendant against governmental concern for judicial

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[3]Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> [i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever othe relief justice requires...

economy. United States v. Staller, 616 F.2d 1284, 1294 (5th Cir. 1980). Inherent in every joint trial is, of necessity, some degree of bias. Only in the event such prejudice appears to be compelling does severance become warranted. United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973).

[10] The following test for assessing the existence of "compelling prejudice" has been adopted by this circuit:

> '[w]hether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence

> that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.'

Tillman v. United States, 406 F.2d 930, 935 (5th Cir. 1969)(citing Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965)). See also United States v. Zicree, 605 F.2d 1381, 1388-89 (5th Cir. 1979).

[11] Viewed according to the foregoing standard, the trial of Bennett with Marszalkowski was fully proper. Bennett's claim of prejudice is addressed solely to the introduction at his joint trial of evidence consisting of 38 methaqualone tablets and several vials of cocaine, which Marszalkowski had possessed in her apartment. We note, however, that on this evidence, the jury was unable to reach a verdict

regarding Marszalkowski's own involvement in a conspiracy; hence a mistrial was declared as to her on this count. Consequently, the court does not accept the appellants' unsubstantiated assertion that what was clearly not prejudicial even to the individual against whom it was introduced - Marszalkowski - could nevertheless have prejudiced Bennett.

Bennett argues additionally that the court erred in failing to caution the jury to consider those items only as against Marszalkowski. However, since it was Marszalkowski alone who was charged as to those particular items, jury confusion does not seem likely. Moreover, at the close of trial, the judge carefully instructed the jury to consider each offense and each defendant

separately.[4] We conclude that this explicit caution sufficed to cure any possible confusion or prejudice in the minds of the jurors. See United States v. Johnsto, 547 F.2d 282 (5th Cir. 1977); United States v. Davis, 546 F.2d 617, 520 (5th Cir. 1977).

B. Sufficiency of Evidence

Conspiracy

[12, 13] Bennett argues that declaration of mistrials as to Marszalkowski and Mitchell followed by

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[4]The trial judge cautioned the jury by stating:

> Now, a separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant. R.Vol.X at 503.

the government's dismissal of their conspiracy indictment renders insufficient the evidence of his own participation in the alleged conspiracy. The crux of Bennett's claim is that once conspiracy charges against Marszalkowski and Mitchell were dismissed, no more than a single sales transaction was provable. He contends that the remaining evidence of a lone sale to him by Brock simply fails to support an inference of their joint conspiracy. Acknowledging that his co-defendant, Congote, was convicted of conspiracy at a separte trial, Bennett suggests, without foundation, that Congote's conviction related to a separate conspiracy. Bennett fails to recognize, however, the crucial principle that a declaration of mistrial is not equivalent to a factual determination. United States v. Nelson,

599 F.2d 714, 716 (5th Cir. 1980); United States v. Ballard, 586 F.2d 1060, 1064-66 (5th Cir. 1978). The only prerequisites to a proper finding of the defendant's guilt are proof beyond a reasonable doubt of the conspiracy's existence; Bennett's knowledge of it; and his agreement to become a member. United States v. Suarez, 608 F.2d 584, 586 (5th Cir. 1979). We find that the totality of evidence supplies each of these elements of guilt. Bennett's reference to having contacted "his people" in order to supply the agents with cocaine; his accurate description of the cocaine package as football-shaped; his agreement to distribute one kilo of cocaine initially, to be followed by three more; his phone call to Brock, in which he discussed the delivery of three additional kilos and in which Brock indicated his complete familiarity with

the proposed transaction, point to his and Brock's "concert of action, all working together with a single design to accomplish a common purpose," United States v. Villareal, 565 F.2d 932, 938 (5th Cir. 1978)--the distribution of cocaine for monetary gain. We therefore reject his assertion of insufficiency.

Facilitation

[14] Bennett launches a similar attack on the adequacy of the evidence supporting his conviction for use of a telephone to commit a felony. Since one phone call made by Bennett to Brock was initiated at the agents' behest, Bennett contends that it cannot form the basis for the facilitation count. This contention, while accurate, certainly is not dispositive, since it is not upon this particular phone call that the facilitation count is based.

Rather, the charge is founded on other phone calls with Agent Brown, see R.Vol. VIII at 57; Supp.R. at 152, and with Brock regarding the drug deal, to which Bennett himself testified at trial, see R.Vol. IX at 316-320. United States v. Arias, 639 F.2d 1183, 1185-6 (5th Cir. 1981).

Accordingly, we find meritless the appellant Bennett's challenge of his conviction for facilitation of a felony.

III. Marszalkowski's Appeal

Insufficiency of Evidence

[15] Joanne Marszalkowski likewise argues that insufficient evidence was presented to support the charge against her of possession with intent to distribute cocaine and methaqualone. She consequently claims reversible error in the trial judge's denial of her motion for a directed

verdict of acquittal. We disagree. Based on our evaluation of the evidence in a light most favorable to the government, see Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that reasonable jurors could indeed have found the evidence inconsistent with every hypothesis of her innocence, United Stats v. Moore, 505 F.2d 620, 623 (5th Cir.), cert. denied, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975).

[16, 17] Possession of narcotics may be constructive or actual. United States v. Goldstein, 635 F.2d 356, 362 (5th Cir. 1981). A defendant's constructive possession of contraband may be established by circumstantial evidence of his or her ownership or control of the premises in which the contraband is hidden. United

States v. Moreno, 649 F.2d 309, 312 (5th Cir. 1981). The apartment in which the instant drugs were concealed was owned by Joanne's mother and rented in Joanne's name; the cocaine and methaqualone introduced against her were recovered from a tall dresser in her bedroom containing women's clothing and from the nighttable near her bed. These facts, which provide ample evidence of her dominion over the premises from which the contraband was recovered, fulfill the requisite element of constructive possession.

Furthermore, the high purity of the cocaine found in the tall dresser

and nighttable,[5] along with the recovery from her apartment of a substance used to cut cocaine, a large amount of cash ($10,500.00) and a weapon (.38 Smith & Wesson revolver concealed in the nighttable next to her bed) constitute surrounding circumstances from which Marszalkowski's intent to distribute is readily inferrable. United States v. Grayson, 625 F.2d 66 (5th Cir. 1980); United States v. Muckenthaler, 584 F.2d 240, 247 (8th Cir. 1978); United States v. Mather, 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (1972).

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[5]Subsequent chemical analysis of the cocaine found in the bedroom pursuant to execution of the search warrant indicated that the 2.4 grams in the tall dresser, and the 25.3 grams and 10.5 grams in the nighttable next to the bed were, respectively, 86%, 84% and 85% pure. R.Vol. IX at 238-39, 247.

Validity of Search Warrant

[18] The appellant would, however, have the court delete from its consideration of the sufficiency of the evidence all items seized from her apartment, including those found during execution of the search warrant. While supporting the trial court's invalidation of the warrantless entry to arrest Brock, she challenges its failure to strike as unnecessarily tainted the evidence found in the later search conducted pursuant to a warrant. She contends that the probable cause supporting issuance of the warrant was based on observations made in the apartment immediately after the unlawful entry; hence, given the illegality of the initial entry, all that followed was "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct.

407, 9 L.Ed. 2d 441 (1963). We need not explore, however, the merits of Marszalkowski's argument, since we agree with the government's response as appellee in United States v. Marszalkowski, No.80-5597, and its identical argument as appellant in the separate appeal of United States v. Brock, No. 80-5621, that the agents' original entry comported fully with constitutional stricture.[6] United

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[6]In the corrected opinion of United States v. Congote, 656 F.2d 971 (5th Cir. 1981), the fifth circuit affirmed the conviction of severed co-defendant Jorge Congote. In so doing, it explicitly left open the issue of the validity of the initial entry and search:

> The foregoing discussion of the asserted violations of the rights of Brock and Marszalkowski, upon which appellant claims standing to rely, are merely assumptions based upon the record in this case, including the magistrate's report. It is not to be construed as a definitive holding that their respective rights were in fact violated. Id. at 975, n.6

States v. Allen, 588 F.2d 1100, 1106 (5th Cir. 1980). We consider next our reasons for this conclusion.

IV. Government's Appeal from Order of Suppression

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), represents the Supreme Court's most recent pronouncement regarding the elements necessary to support a warrantless entry to a suspect's home for arrest purposes. Payton holds that, absent exigent circumstances, probable cause by itself is insufficient to support a warrantless entry into a private residence for arrest. Although the facts of the instant case occurred nearly half a year prior to Payton, the trial judge applied Payton's standard in ruling on the defendants' motion to suppress.

[19,20] In our view, however, the established criteria for determining the retroactivity of a new constitutional rule, consisting of

> (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards

Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), militate resoundingly against retroactive application of Payton. We note first that the purpose to be served by applying Payton retroactively is that of the exclusionary rule itself: deterrence of police activity violative of the fourth amendment. Since police could not have known of a future interpretaton of the fourth amendment's mandate at the time the instant facts occurred, no possible deterrence of

conduct in contravention of that future rule could ensue. United States v. Peltier, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1974); Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182 (1973). Indeed, police conduct in the instant situation reflected no less than justifiable, good faith reliance on what they reasonably believed to be the existing constitutional standard governing warrantless home arrests, recognized by the Supreme Court itself in Payton to be a "longstanding" nationwide practice. 445 U.S. at 598, 100 S.Ct. at 1386. Finally, the burden on the administration of justice were Payton to be applied retroacticely would be massive. Since the practice of

warrantless entry has been "widespread," id.,[7] clearly many convictions would be subject to reversal. Such reversal would be mandated despite the fact that the evidence suppressed would be highly probative. Indeed, the exclusion of reliable evidence seized prior to Payton would impair rather than enhance the pursuit of truth at trial. Stone v. Powell, 428 U.S. 465, 490-91, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067; United States v. Williams, 573 F.2d 348, 350 (5th Cir. 1978).

In recognition of precisely these concerns, the Supreme Court of the

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[7]The Supreme Court in Payton noted that "a majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." 445 U.S. at 598, 100 S.Ct. at 1386.

United States has refused to apply retroactively new standards established in analogous fourth amendment contexts:

> It is indisputable ... that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.

United States v. Peltier, 422 U.S. 531, 535, 95 S.Ct. 2313, 2316, 45 L.Ed.2d 374 (1975)(holding not retroactive the rule in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed. 2d 596 (1973), which requires probable cause to justify automobile searches conducted by roving border patrols). The Supreme Court has noted additionally that

> [i]f the purpose of the exclusionary rule to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

422 U.S. at 542, 95 S.Ct. at 2320. See also Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965),(holding not retroactive the rule of Mapp v. Ohio, 366 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 108 _____(1961), which mandates application of the fourth amendment's exclusionary rule to state criminal proceedings); United States v. Corcione, 592 F.2d 111, 118 (2d Cir. 1979).

In light of the above analysis, we hold that the balance of relevant considerations weighs heavily againt retroactive application of the Payton standard.

The trial judge further indicated that pre-existing fifth circuit law was identical to Payton in requiring both probable cause and exigent circumstances to justify warrantless home arrests; that, as the trial judge found, exigent circumstances were not present here; and that, therefore, the warrantless entry must be deemed illegal even if Payton were held not retroactive. Our review, however, reflects that prior fifth circuit law was far from such a model of clarity.

Indeed, the Supreme Court in Payton appeared to have interpreted fifth circuit law as not requiring exigent circumstances, when it specifically contrasted United States v. Williams, 573 F.2d 348 (5th Cir. 1978) with Payton-like decisions of other circuits. 445 U.S. at 575, n.4, 100

S.Ct. at 1374. United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978), decided four months after Williams, compounds the confusion. While asserting that a warrantless arrest of an individual at home grounded on probable cause and exigent circumstances would certainly be constitutional, it offers no insight as to whether such a combination is necessary to validate such an arrest:

> [I]t seems clear to us that, most assuredly, the Supreme Court [in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 783 (1967)] was saying that officers do not always have to have a warrant to enter a house for the arrest of a felon. If they have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant the arrest is not constitutionally invalid. This is certainly the law as it exists in the Fifth Circuit.

581 F.2d at 1146. See also United States v. Savage, 564 F.2d 728, 733 (5th Cir. 1977) (upholding a warrantless search of motel room immediately following arrest based on probable cause alone), United States v. Hoffman, 488 F.2d 287 (5th Cir. 1974)(upholding warrantless entry and search of motel room on basis of probable cause alone); United States v. Wysocki, 457 F.2d 1155 (5th Cir.) cert. denied, 409 U.S. 859, 93 S.Ct. 145, 34 L.Ed.2d 105 (1972)(upholding warrantless arrest in motel room based on probable cause and exigent circumstances, without discussion of whether exigent circumstances necessary).

[21] We therefore reject the trial judge's conclusion that Payton represented no more than a re-articulation of what already was the established law in this circuit.

The court in Gaultney did find exigent circumstances in a situation closely analogous to the one at hand. One Francis Gilmere had offered to sell cocaine to undercover DEA agents. During police surveillance of the apartment from which Gilmere was observed carrying the drugs, three individuals were seen entering and departing. After Gilmere's arrest, police entered the apartment without a warrant and arrested three men found inside. A protective sweep was then conducted during which contraband was found in plain view. On these facts, the warrantless arrest and ensuing search were upheld:

> The officers had good reason to believe that as much as ten pounds of cocaine was in the house. They saw, too, that considerations of privacy ordinarily attributable to a home were present in only

> minimal form. Gilmere had visited the house and quickly left with a package which he had not carried there. A woman soon left. Two men drove up in another vehicle and entered. The place was a beehive of activity, involving a comparatively large number of people who did not appear to be members of the family group. The officers could reasonably infer that those within the house were momentarily expecting the return of Gilmere, with $20,000 from the intended transaction at the restaurant; his failure to return would likely raise flags for people immersed in so dangerous an activity as the cocaine traffic.

581 F.2d at 1147.

[22] Likewise, in the instant case, officers maintained surveillance of an apartment belonging to arrested co-conspirators Bennett's source. Having previously listened to a taped conversation between Bennett and his source, Brock, in which the latter had assured Bennett that he would obtain

more drugs later that night or the next morning for another deal, the police's observation, as in Gaultney, of two individuals entering and leaving the apartment carrying packages gave rise to their reasonable belief of ongoing criminal activity within. Moreover, given Brock's instruction that Bennett should return to the apartment that night, Bennett's failure to do so, like Gilmere's failure to show in Gaultney, would surely have aroused Brock's suspicion. These circumstances, coupled with the relative ease with which narcotics may be disposed of, clearly meet, if not surpass, the requisite level of exigency found in Gaultney. See also United States v. Tolliver, 665 F.2d 1005, 1007-1008 (11th Cir. 1982). As the fifth circuit noted in Gaultney, drug dealers are likely to be armed and

dangerous. 581 F.2d at 1147. We consequently find that police effectuating Brock's arrest possessed both the right and the obligation to secure the apartment by conducting a protective sweep. See United States v. Quigley, 631 F.2d 415, 418-19 (5th Cir. 1980); United States v. Bowdach, 561 F.2d 1160, 1168-69 (5th Cir. 1977). Hence, even assuming arguendo the accuracy of the appellee's interpretation of pre-Payton fifth circuit law, we find, finally, that exigent circumstances were present in the instant situation, and, on that basis, no justification existed for excluding the contraband found in plain view.

V.

Based on the foregoing, we herety AFFIRM the convictions of

co-defendants Marszalkowski and Bennett in the case of United States v. Marszalkowski, no. 80-5597. In the separate appeal of the United States in the case of United States v. Brock, no. 80-5621, we hereby REVERSE the trial judge's suppression of evidence obtained during the initial warrantless search of the apartment conducted subsequent to the arrests and REMAND that case for trial.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 80-5621

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JACK BROCK,

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 1, 11 Cir., 1982, __ F.2d __).

(May 14, 1982)

Before RONEY, FAY, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

*The Honorable Newell Edenfield, United States District Judge for the Northern District of Georgia, sitting by designation. This case is being decided by a quorum due to the death of Judge Edenfield on December 27, 1982, 28 U.S.C. Section 46(d).

5854A061782

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1-CR-JWK

UNITED STATES OF AMERICA, Plaintiff, v. LORAN BENNETT STANFORD RAYE MITCHELL JACK BROCK JOANNE MARSZALKOWSKI, Defendants.	)	EXCERPT OF TRIAL

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
Monday, June 9, 1980

The above-entitled cause came on for trial before the Honorable JAMES W. KEHOE, United States District Judge, and a Jury, at the time and place aforesaid, pursuant to Notice.

- - - -

APPEARANCES

ALAN L. WEISBERG,
Assistant United States Attorney,
Attorney for the Government.

STEPHEN ROSEN, ESQ.,
Attorney for Loran Bennett.

STEPHEN LIPTON, ESQ.,
Attorney for Stanford Raye Mitchell.

TED KLEIN, ESQ.,
Attorney for Jack Brock.

TAM WILSON, ESQ.,
Attorney for Joanne Marszalkowski.

THE COURT: I will interrupt your argument. I know you have other matters you want to present to me on your motion. Go ahead.

MR. KLEIN: The basic thrust of my argument is the initial entry was illegal; based upon the recently decided case of Paten versus New York, which I do not have the exact citation, but I believe the Court is now familiar enough with it to know what it is that I am talking about.

THE COURT: Florida Supreme Court, 1371.

MR. KLEIN: This is not an exigency circumstance case. The fact I have pointed out that conversation totally contradicts the possibility of any exigencies.

THE COURT: What time of the night was it?

MR. KLEIN: About 11:30 at night, your Honor. There were no facts to indicate that the defendant was going to flee; that he was going to destroy evidence; that there were confederates at large in that particular apartment. That requires them to go and immediately search the premises.

All of the facts contradict that. The conversations that took place indicates there was no cocaine present; that there was nobody else present and that things had really settled down for the night, and that any activity that was going to take place was going to take place the following day.

Now, in that connection then that brings us to---

THE COURT: Let me stop you there, if I may, so we can at least have a proper record for the Fifth Circuit Court of Appeal. Bring to my attention the Magistrate's recommendations where he ever ruled that exigency circumstances did or did not take place.

I think you got off on a base that did not include exigency circumstances.

MR. KLEIN; I was merely anticipating the possibility.

THE COURT: Let me go over it a minute and see. Of course, in reading

your brief, I think you are inclined to think you do not have to show exigency circumstances.

MR. WEISBERG: Our position is, first, there were exigency circumstances.

THE COURT: No facts have been established for that.

MR. WEISBERG: We believe there are facts to support it.

THE COURT: Let me back you up a minute then. As I understood your brief, you interpreted Williams to mean that you did not need any exigency circumstances.

MR. WEISBERG: True.

THE COURT: There are several cases that seem to state that without Paten, the law in the Fifth Circuit has always been that you must have exigency circumstances before you can go in to make an arrest without a warrant. So, with or without Paten, in the Fifth Circuit, you cannot make an arrest in a home without exigency circumstances.

MR. WEISBERG: I do not agree with that.

THE COURT: What authority do you rely on so I can understand your position?

MR. WEISBERG: I rely on the Supreme Court.

THE COURT: That is pretty good authority. What case?

MR. WEISBERG: Paten.

THE COURT: Certainly Paten says you cannot go in without, and then they didn't get to exigency circumstances. They say the statute which permits you to do so is unconstitutional to the Fourteenth Amendment.

MR. WEISBERG: The fact it is new Law---

THE COURT: It may be in some circumstances, so I think what we have to really do is, and if I am analyzing it wrong, you all help me, here, but it appears to me that what we have is that

as pertains to the Fifth Circuit, that has always been the law, and they came back in in McGuire, 608 F.2d 1028, where they said:

> "It has been repeatedly held to be the law of this Circuit that where officers have probable cause to arrest for a felony the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant, the arrest is not constitutionally invalid."

I think Williams stands for the proposition interpreted by the Court; that in the Fifth Circuit, at the time of Paten, before and after, you must have a warrant unless or exigency circumstances.

MR. WEISBERG: I have no authority to the contrary except the Supreme Court.

THE COURT: Assume I will build on that hypothesis. It is my judgment that is the law in the Circuit and that is the law of the Circuit at that time.

My next question to you is: I do not recall that you ever were given an opportunity or made a contention that there were exigency circumstances.

MR. WEISBERG: At the time that I came into this case---

THE COURT: My question to you is: Do you want the opportunity to present to the Court some testimony

there were exigency circumstances?

MR. WEISBERG: Yes.

THE COURT: I am going to permit that.

MR. KLEIN: In referring to the testimony that has already been taken, we have 600 pages of testimony.

THE COURT: None of it involves exigency circumstances.

MR. KLEIN: That is because, in all humility, I vitiated each element of exigency circumstances through my cross examination of the various witnesses; when I asked them the specific questions to which I received an affirmative response; "Did you have any reason to believe that?"

THE COURT: I will consider the 600 pages. I am sure you were very intense in your examination. My point is: What is it you want me to consider?

MR. WEISBERG: The fact when they went to the apartment, they saw two men go in the apartment and two people come out; two men come out of the apartment with packages.

THE COURT: Maybe if counsel for the defendant has no objection, we would save an awful lot of time if you outlined the testimony you want and then we can get you all to concede that the testimony for this purpose is correct, so I want you to have an opportunity to show me what exigency circumstances existed at the time.

MR. WEISBERG: If I may have a moment, your Honor.

THE COURT: Would you want five or ten minutes because I know you are getting onto new ground?

MR. WEISBERG: Yes, I would.

THE COURT: We will take five, ten minutes. I will be back then.

[Thereupon a short recess was taken, after which the following proceedings were had:]

THE COURT: Counsel for the Government want to proffer to the Court what your testimony would be in addition to anything that is in that record that

we have gone over?

MR. WEISBERG: Your Honor, the record does make reference on Page 307 and 308 to the two men who were observed going into the apartment with brief cases. Now, recall the testimony earlier today; Mr. Bennett went into the apartment with the brief case and came out. These two men were going into the apartment with brief cases and coming out shortly thereafter.

THE COURT: That is in your affidavit for a search warrant?

MR. WEISBERG: I believe it is, your Honor. Furthermore, your Honor, the fact that the testimony was the call was made and they could not go through with the three kilos then does not mean

that it was not there available or there may not have been something less than that, and just because a suspect said something, there is no reason, I do not believe, for this Court to necessarily accept that on its face.

The fact remains the agents were told by Bennett, who was cooperating at the time, that he purchased it.

THE COURT: Counsel, I think maybe what we have to do is for you to educate me why I am getting off base. I do not think there is any question he had probable cause to arrest. I do not think either one of these two defendants; you did not have probable cause to arrest. All this seems to go to probable cause as distinguished from exigency circumstances.

MR. WEISBERG: I am trying to get to the exigency circumstances, and the most powerful information I have on that is the fact that when the house or the apartment was under surveillance, they saw people going there and coming out carrying suitcases or brief cases, which very easily could have been cocaine, and this could have been ongoing.

THE COURT: Which still seems to be a very beautiful dialogue for the ascertainment, procurement of a search warrant, but what does that have to do with exigency circumstances of why he could not be arrested than to go down and get a judicial officer to issue an arrest warrant?

MR. WEISBERG: The fact that a crime could have gone on, it could have continued. More people could have come there and it was necessary to do it at that time.

THE COURT: Do we have any legal authority of what exigency circumstances are?

MR. KLEIN: There has to be a reasonable belief that if the officers do not do something right now, that they are going to face the possibility that a suspect will escape. That evidence will be destroyed that something will happen, and that requires them to rush in and take immediate action.

We do not have any of those things here. What he has raised are

classic suspicions.

MR. WEISBERG: People were coming and going. The Government did not know if Brock would be there the next day. They did not know if it was his residence. Had they not made an arrest, he may not have been there the next morning.

THE COURT: If he had walked out of that house, it would not have been any problem, would there?

MR. WEISBERG: Which gets to the next issue of consent.

MR. WILSON: They have to prove he was going to be there the next day, because the transcript shows he fronted---

THE COURT: I have heard enough on this point. I do want to go back to my point; however, assuming you are correct in all this, that the initial entry into the home was, in fact, improper; however, they made a sweep which, it had been a proper entry, would have been admissible. It would appear to me, independent of all this, why is that affidavit not sufficient for the search warrant?

MR. KLEIN: Taking everything out---

THE COURT: Take all that out of the affidavit. There is still sufficient testimony in that affidavit to have issued the search warrant.

MR. KLEIN: Our motion is that taking all of that out of there, the affidavit, merely establishes that cocaine had been obtained from that apartment. It does not establish the fact that because there had been cocaine there, that there is a reasonable belief that there is more in there. The fact that something comes from there, you have to be able to show a classic affidavit for something like this, that the affiant says that he saw more cocaine in there, or that he was advised there was more cocaine.

Not only don't we have that; we have the exact opposite, a statement that the alleged source would have to wait until tomorrow. They never told that to the Magistrate, and I submit that if the agent had included that fact

in his affidavit, that it only would have contradicted probable cause, but the Magistrate would have said, "Under those circumstances, I can't give you any more, whatsoever."

THE COURT: Counsel, did you care for any oral argument?

MR. WILSON: No, your Honor. The thing is sufficiently handled already.

THE COURT: Anybody want any additional argument?

MR. WEINBERG: Just, your Honor, that I am advised some of these facts may have been brought to the attention of the Magistrate, although not contained in the affidavit.

THE COURT: It is the ruling of the Court that the Magistrate's recommendation insofar as his interpretation of Williams and the law in the Fifth Circuit and the applicability or inapplicability of Petan, will not be followed.

It is the ruling and judgment of this Court that the law in the Fifth Circuit on the date in question was and prior to Paten, the officers here did need to establish exigency circumstances prior to being able to make an arrest in a home.

I have assumed that the record reflects that this "home" was Brock's and the lady together.

MR. WILSON: At the time of the arrest.

THE COURT: It is the ruling of the Court exigency circumstances did not exist. I therefore am now going to grant the motion to suppress any of the evidence that was received by virtue of the sweep that took place immediately upon the arrest.

It would, therefore, follow that statement made at that time would also be suppressed. I am going to deny your motion to suppress the evidence which was obtained by virtue of the search warrant.

It is the judgment of the Court the affidavit for the search warrant, independently of the fact and acts

taking place outside the home and in the home, were sufficient to justify the issuance of the search warrant, and your motion to suppress those items will be denied.

It will be the burden of the Government to separate those items received on the sweep and those items received on the search. Thank you, gentlemen. 1:00 o'clock.

[Recess taken.]

MR. WEISBERG: I would ask the Court to reconsider its motion based upon the consent issued that the Court did not address itself to which was---

THE COURT: They fell on the door, I think is the way they described it.

MR. KLEIN: With their guns drawn.

THE COURT: If you recall something you want to refresh my memory as to being consent---

MR. WEISBERG: I have not been to the apartment, but they knocked on the door. I know from the transcript, once you fell into the door, you can see something in plain view. I am not sure the issue of whether you can see it---

THE COURT: Agent Brown, anything we say, don't you take it personally. I know you are doing your job and I am doing mine.

When you fall in the door, it

is difficult to have consent.

MR. WEISBERG: I am not certain it is critical he fell in the door. The man knocked on the door and he opened the door and the agent took a step in and then could see. I think that is consent.

THE COURT: All right, sir. Reconsideration on the grounds of consent was very thoroughly considered by the Court and denied. Do you want me to reconsider something?

MR. KLEIN: No. I do, but I won't bring it up now.

Your Honor, I would assume by virtue of the ruling, the entry and the arrest was illegal, that the presence of

the defendant, Jack Brock in the apartment, which was discovered as a result of the illegal entry, also then is suppressed because it is the Government's position that it is his mere presence in that apartment, which is an incriminatory fact connecting him to the possession of the items subsequently found pursuant to the search warrant, and consequently, if they went in there illegally and found him in there, in a manner that was illegal, then that fact, too, has to be suppressed.

THE COURT: I do not have any authority for that proposition. Do you have any on that particular vein?

MR. KLEIN: I can give you Wong Sun and the other cases that deal with the suppression of an illegal fruit.

THE COURT: I do not think that would be covered by Wong Sun.

MR. WEISBERG: Further, your Honor, even if they were not able to see anything in plain view from the time they knocked on the door, certainly the DEA agents could knock on anybody's door and a man can come and answer the door. Maybe from that point of view, before they fell into the door, they could not see anything, but certainly they saw him from the moment he opened the door.

MR. KLEIN: That is absurd, your Honor. That is a classic gaining entry by a roost; in other words, say we do not have probable cause or we do not have a search warrant, but let us see if we can get it by knocking on his door

and going up to it, leaning up against the door. If he answers it and we see him in there, then we have probable cause.

THE COURT: I think he can knock on the door if he had an opening of the door, without a falling in. That is falling in, and if the trier of facts does, in fact, believe that as he opened the door, he saw something, maybe you have that. I do not perceive that to be the fact.

MR. KLEIN: I also have several Fifth Circuit cases that deal with the question of the sufficiency of the affidavit for a search warrant to believe that some particular item is in the premises. I would like to cite that for the Court.

One is United States versus Flanagan, 423 F.2d 745, in which the Court specifically stated that an affidavit must have some basis of showing that the item, which is sought, is, in fact, in the premises, and I will quote from Page 747 where they go through the affidavit and then say, "The statement, even if reliable, that a named person who is a known felon has committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away."

That is what we have here, your Honor.

It is an affidavit that says the defendant obtained drugs from that premises, but it does not, in any way, even state that there is a reasonable belief that there is anything still on the premises.

The other case which I would like to cite is United States versus Character, appropriately named, Fifth Circuit, 1978, 568 F.2d 442, in which Judge Fay pointed out that the affidavit contained conclusionary statements that dealt with the question of whether or not there was anything on the premises to be searched, and also found that the affidavit misled the Magistrate and had the Magistrate known additional facts, that the affidavit for the search warrant would have been insufficient and the search warrant, therefore, would have been insufficient, and the Court

ruled that it should have been suppressed, which we maintain if the Magistrate had heard that telephone conversation in which Mr. Brock said, "I will try to get three more tomorrow," that there would have been absolutely no basis then upon which anyone could have believed reasonably there was anything at all inside the premises.

THE COURT: I understand your position. My ruling will remain the same.

MR. WILSON: I would join in that.

THE COURT: All right. That is as to both defendants, Brock and Marszalkowski.

* * * * * *

CERTIFICATE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, PAUL C. HAFERLING, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 18, is a true and correct transcription of an excerpt of my stenographic notes of the proceedings before the Honorable JAMES W. KEHOE, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 15th day of August 1980.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to the Solicitor General of the United States, Department of Justice, Washington, D.C.

By: THEODORE KLEIN
THEODORE KLEIN